

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BUCKINGHAM TOWNSHIP	:	
	:	
v.	:	
	:	
HON. KEN WYKLE, ADMINISTRATOR,	:	
FEDERAL HIGHWAY ADMINISTRATION,	:	
	:	CIVIL ACTION
DAVID LAWTON, CHIEF OF PLANNING,	:	
REGION 3, FEDERAL HIGHWAY	:	NO. 99-621
ADMINISTRATION,	:	
	:	
DELAWARE VALLEY REGIONAL	:	
PLANNING COMMISSION, and	:	
	:	
BRADLEY L. MALLORY, SECRETARY	:	
FOR THE DEPARTMENT OF	:	
TRANSPORTATION, COMMONWEALTH OF	:	
PENNSYLVANIA	:	

MEMORANDUM ORDER

This case arises out of the proposed improvement of U.S. Route 202, Section 700 ("Section 700"). Section 700 extends from just south of Pennsylvania State Route 63 in Montgomery Township, Montgomery County, to Pennsylvania State Route 611 Bypass in Doylestown Township, Bucks County. This section of highway is approximately 9 miles in length, covers 9,100 acres and crosses 2 counties and 8 municipalities. Plaintiff Buckingham Township alleges that defendants Wykle, Lawton and Delaware Valley Regional Planning Commission ("DVRPC") violated a variety of federal and state laws during the process of considering the aforementioned highway construction project. Pennsylvania Department of Transportation ("PennDOT") Secretary

Mallory has intervened as a defendant and plaintiff has filed an amended complaint asserting claims against him.

Presently before the court are plaintiff's motion for partial summary judgment, plaintiff's "supplementation" to its motion for partial summary judgment and plaintiff's motion for sanctions and contempt. Plaintiff is moving for summary judgment at this juncture solely on its NEPA claim.

The Administrative Procedures Act limits the court's review to the whole administrative record ("the Record") before the relevant agency at the time of its decision. See 5 U.S.C. § 706; Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971); Higgins v. Kelly, 574 F.2d 789, 792-94 (3d Cir. 1978); Twiggs v. U.S. Small Bus. Admin., 541 F.2d 150, 152-53 (3d Cir. 1976).

The Federal Highway Administration ("FHWA") originally filed the Record in August 1999. The essence of plaintiff's NEPA claim is that defendants manipulated the Record by: (1) concealing certain documentation, correspondence, set-ups, assumptions, formulae, co-efficients and other data underlying the Final Environmental Impact Statement ("FEIS"), U.S. 202 Traffic Analysis for Section 700 Supplement No. 4 ("Supplement No. 4") and the Record of Decision ("ROD") so as to prevent disclosure to the public and inclusion in the Record; (2) destroying such information and documentation also to prevent

disclosure to the public and inclusion in the Record; and, (3) manipulating the ROD and Supplement No. 4 by manufacturing data and assumptions without any true empirical basis so as to advance the Section 700 project despite its alleged negative impacts on plaintiff.

In response to previous motions by plaintiff, on November 19, 1999 the court ordered defendants to make the Record whole by "filing and providing to plaintiff all documentation, correspondence, set-ups, assumptions, formulae, co-efficients and other data concerning U.S. 202 Traffic Analysis for Section 700 Supplement No. 4 and DVRPC Responses to Buckingham Comments 1-4 (April 1998), all communications between the Pennsylvania Department of Transportation and the Federal Highway Administration and within the FHWA regarding the relationship between the Pool's Corner project and Section 700, and any version of Supplement No. 4 dated December 1996 which may exist." On December 17, 1999, defendants supplemented the Record pursuant to that court order.

Plaintiff subsequently filed the instant "supplementation" and motion for sanctions and contempt, maintaining that defendants have still not made the Record whole or disclosed certain information to the public and continue to base the ROD on manufactured or incomplete data.

Plaintiff relies on the opinion of Dr. Anthony Tomazinis, a Professor of City Planning and Transportation Planning at the University of Pennsylvania.¹ Dr. Tomazinis asserts that the information presently in the Record is insufficient to create a report such as Supplement No. 4.² He therefore concludes that the record could not possibly comprise all the information before FHWA at the time it issued the ROD.

Plaintiff also points to the acknowledgment of two DVRPC employees that certain set-ups and assumptions were discarded by DVRPC. Defendants assert that some of the setups and assumptions from the traffic model used to conduct the analysis in Supplement No. 4 are not available as they existed at the time Supplement No. 4 was created simply because the traffic

¹The most substantial Tomazinis submission, Exhibit C to plaintiff's "supplementation," is replete with handwritten edits which appear to be made by the same individual who scribbled handwritten edits in the body of plaintiff's "supplementation." The court certainly cannot discern whether such changes were made prior to Dr. Tomazinis placing his signature on the statement or after the fact. While the court may not consider the statements of Dr. Tomazinis insofar as they suggest merely a disagreement among experts about the type of analysis ideally employed, see Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 377-78 (1989), they may be pertinent to show the possibility that data necessary to the analysis which was employed was ignored or never existed.

²For example, Document #9 of defendants' December 17, 1999 supplemental filing purports to include the set-ups or assumptions used in creating Supplement No. 4. Dr. Tomazinis claims that Document #9 presents only "prototypes," which generally describe the nature of the assumptions, and does not include the actual values which are necessary to the analysis underlying Supplement No. 4.

model is a computer program which is constantly revised in the ordinary course of business to accommodate updated forecasting methodology, computer technology and population and traffic-related data.

Defendants persistently aver that the Record as supplemented represents the complete record before FHWA at the time it filed the ROD. Defendants' submissions on this issue, including a declaration by W. Thomas Walker of DVRPC, assert that the data and documents plaintiff seeks are contained in the Record and point to the specific locations of such data and documents. Defendants' submissions, including Dr. Walker's declaration, also suggest that analysis of that data by a computer program known as TRANPLAN, which is available for purchase by the public, will allow plaintiff's expert to recreate the results set forth in Supplement No. 4.³

Summary judgment for plaintiff on its NEPA claim is inappropriate because it does not clearly appear from the pertinent record, construed in a light most favorable to the non-movants, that defendants withheld from the administrative record, by concealment or destruction, data necessary to evaluation of the ROD.

³Dr. Walker's declaration states that Supplement No. 4 could be recreated by using the TRANPLAN program in conjunction with the "Network," the "Prototype Setups" and the trip tables, all of which allegedly were provided in the December 17, 1999 filing.

Plaintiff's motion for sanctions and contempt will be denied as plaintiff has not demonstrated that defendants have violated the court order of November 19, 1999. The time has arrived, however, definitively to resolve the lingering dispute regarding the completeness of the Record. The court will require defendants to produce to plaintiff information necessary to evaluate the completeness of the Record and to affirm under oath that the Record is complete so that this matter may proceed to resolution.

ACCORDINGLY, this day of February, 2000, upon consideration of plaintiff's Motion for Partial Summary Judgment (Doc. #29, Part 1) and "Supplementation" thereto, plaintiff's Motion for Sanctions and Contempt (Doc. #62) and defendants' responses to each, **IT IS HEREBY ORDERED** that plaintiff's Motion for Partial Summary Judgment is **DENIED** and plaintiff's Motion for Sanctions and Contempt is **DENIED**, however, defendants shall within twenty days file and produce to plaintiff any documentation, correspondence, set-ups, assumptions, formulae, co-efficients and other data supporting Supplement No. 4 (including the information described in defendants' Brief in Opposition to Plaintiff's Supplementation) in a computer diskette format prepared for use with the TRANPLAN program; produce to plaintiff a copy of the TRANPLAN program and any instructions necessary for running the program; and, file sworn affidavits from persons with direct knowledge verifying that defendants have

filed in the administrative record and produced to plaintiff all documents, data and other pertinent information on which FHWA relied in creating its Record of Decision or which served as the basis for any information on which FHWA so relied, and detailing the nature of any assumptions, set-ups or related data which has been irretrievably discarded or lost and the reasons therefor.

BY THE COURT:

JAY C. WALDMAN, J.